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No. 843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

WARD M. VANDERPOOL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 27, 1966, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, revoking probation and sentencing him into the custody of the Attorney General for a period of eighteen months.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, without opinion, was rendered on September 27, 1966. A petition for rehearing was denied on November 14, 1966. Both are set forth in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1966, the time for filing of petition for rehearing was extended to October 24, 1966 and timely filed petition for rehearing was denied on November 14, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether a special condition of probation, interpreted differently by a trial judge other than the one who imposed original sentence than the Probation Department, Petitioner's tax counsel and an administrative agency, the Internal Revenue Service, is sufficiently clear to satisfy the Constitutional requirement that criminal conduct be defined with certainty.

2. Whether imposition of a special condition of probation that Petitioner make payment to the best of his ability of tax liabilities deprived him of the constitutional right of equal protection of the laws.

3. Was Petitioner denied a fair hearing and did the trial court fail to exercise sound judicial discretion because of:

a. Its misconception or misunderstanding of facts and statutes applicable to the case.

b. Its failure to allow Petitioner the benefit of due process.

c. Its failure to consider that revocation of probation of Petitioner constitutes conviction of misconduct for proper exercise of statutory rights.

d. Its failure to consider that revocation of probation constitutes conviction for failure of a debtor to make payment to the Government in preference to other creditors and before making other necessary expenditures.

e. Its failure to consider that Petitioner acted only upon the advice of competent counsel.

f. Its failure to consider that the record shows that Petitioner or his counsel negotiated in good faith with the Internal Revenue Service while that Service failed to display the same good faith.

g. Whether the trial court, by embracing completely the case presented by the accuser, without allowing complete presentation of evidence in rebuttal was guilty of surrendering to the executive branch the judicial power of imprisonment, particularly since the request for revocation of probation was initiated not by the Probation Department because of failure of Petitioner to heed advice of that department but by the Internal Revenue Service, whose conduct in the case was subject to scrutiny?

h. Its failure to consider that refusal of the Internal Revenue Service to negotiate in good faith, followed by its request shortly prior to expiration of the 3 year probation to revoke such probation constituted entrapment.

i. Its failure to consider that revocation of probation of petitioner constitutes imprisonment for debt.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

Because of the number and length of the constitutional provisions and statutes involved, they are set forth as Appendix B to the Petition, pages App. 5-9, *infra*.

STATEMENT OF THE CASE

Because of the deep feeling of injustice in this case, it is respectfully requested that this Court bear with the following detailed statement of the case, without which it is not possible to convey the basis on which this petition for a writ of certiorari is founded.

Petitioner is a businessman who formerly lived in and operated a business in Rockford, Illinois. Sometime during 1955, Internal Revenue Service began to investigate his affairs and on March 13, 1959 a two count indictment was returned against him in the Northern District of Illinois. The first count charged him with causing the filing for the year 1952 of a false and fraudulent partnership income tax return in violation of Section 3793 (b) (1), Internal Revenue Code of 1939; 26 U. S. C. 3793 (b) (1), and the second count charged him with attempting to evade taxes owed by him and his wife for the calendar year 1952 by filing a fraudulent joint income tax return in violation of Section 145 (b), Internal Revenue Code of 1939; 26 U. S. C. 145 (b) (5-6a).* Both counts pertained to the same taxable year and both violations resulted in income tax evasion for only one year; being the only blemish on an otherwise spotless record.

On April 2, 1959, the Petitioner entered a plea of not guilty.

On November 17, 1961, more than 2½ years after the indictment, the Petitioner appeared before the Honorable

* All references with the suffix "a" are to the printed appendix submitted by appellant to the Court of Appeals, copies of which are being filed herewith. All other references are to the certified record below.

Julius H. Miner (now deceased) represented by counsel and, with leave of court, withdrew the plea of not guilty and entered a plea of guilty to both counts of the indictment (9a). The prosecutor stated that the amount of evaded income was " . ... almost $65,000.00 and the tax is over $34,000.00, that is, without interest or penalty . . . " (11a). The sentence of the court was reflected on the minute order in pertinent part as follows (8a):

> " . . . order imposition of sentence is suspended and defendant is placed on probation for a period of three years *upon the special condition that he make payment of the civil liability to the best of his ability.*
>
> "It is further ordered that the defendant is fined the sum of $10,000.00 and costs on each of Counts I and II, for a total sum of $20,000.00 and costs . . . "

On imposition of probation the following discussion was held (12a):

> "Mr. Calihan: That is, the probation is not conditioned on the payment of any civil liability, the payment of any civil liabilities found."
>
> "The Court: I don't think I can do that. You tell me how it works. Suppose a judgment is entered of $50,000.00. If he cancels it—Yes, *I will say it is conditional upon the payment of the civil liability to the best of his financial ability and it will be incumbent upon him to exhaust every means of raising that fund and to satisfy the Court, and the Government that he has exhausted everything, that he has closed all his assets.*"
>
> Mr. Calihan: I think there is no trouble there. All I am saying was *he still has the right to litigate civilly.*
>
> The Court: *No question about that,* whether it is eighty thousand or nothing. Ycu have entered a plea of guilty and I presume you have taken into consideration all of the elements.

Mr. Calihan: Yes, your Honor.

The Court: And I am finding him guilty on a plea of guilty *without any adjudication of what that amount is* or otherwise we will have to conduct a lengthy hearing and determine that question. (Italics supplied)

It is the interpretation of the above special condition of probation and the accompanying discussion between the trial judge and the defense counsel; and criticism of the method employed by the Petitioner to satisfy the requirement that he make payment of his civil liability to the best of his ability after exhausting all of his assets to raise the required, and at that time, still undetermined amount, that has caused the petitioner to be charged with a violation of probation.

From the time of sentencing to the present, the Petitioner has continuously been represented by competent tax counsel, all of whom have served the Government either in the Internal Revenue Service or in the Office of the United States Attorney, and has been guided by their advice during all of the proceedings with Internal Revenue Service and the courts.

Original counsel advised the Petitioner that in order to completely exhaust his assets as required by the Court order he should liquidate and convert them into cash thereby not only allowing orderly disposition of his assets but also insuring against imposition of a jeopardy assessment which would tie up his funds and deprive him of the means with which to contest the still undetermined civil liability.

Petitioner complied with this advice by converting substantially all of his assets into cash (115a), and finally, on August 31, 1962, after the liquidation had been completed, his tax liability for the years 1951, 1952 and 1953

was determined to be $135,713.64, of which $111,486.39 was attributable to 1952, the one year for which he had been convicted. Sales of securities, loans made against assets retained, and expenditures made from such proceeds, were reported to the Internal Revenue Service either in tax returns filed or in financial statements filed. The Internal Revenue Service, up until the hearing for revocation, almost two years after submission to it of the first financial statement, never questioned the Petitioner or his counsel about any specific item, never advised the Petitioner or his counsel that amplification or substantiation was necessary but chose instead to merely summarily and arbitrarily dismiss the statements and to wait until the hearing for revocation of probation to present its case.

After determination of his civil liability on August 31, 1962, the first contact that Petitioner had personally with officers of the Internal Revenue Service was on or about December 18, 1962 when collection officers Clark and Meahan, attached to the Rockford, Illinois office contacted him, and in a rude, abusive, and threatening manner insisted that all past due business and personal tax returns, which had been delayed because of records held by the Internal Revenue Service and other reasons beyond control of the Petitioner and which were in the process of preparation, be filed; and that payment of amounts due, and/or submission of an offer in compromise be submitted immediately (129-132a). The Petitioner relayed this request to counsel and was advised that since it was not possible for him to make payment in full the proper procedure to follow was to submit an offer in compromise as authorized by Section 7122 of the Internal Revenue Code of 1954 which, in application, provides for payment of tax due to the best of a debtor's ability to pay which conformed exactly to the special provision of probation.

On January 25, 1963 Petitioner submitted the first of a series of five offers in compromise as outlined on page 19 in Brief for Appellee filed by Plaintiff-Appellee in hearing before the United States Court of Appeals for the Seventh Circuit, docket No. 15500. These offers range from an offer of payment of $40,000.00 outright, an offer dated January 25, 1963 which was submitted with a check for $30,000.00, to an offer of payment of $32,459.23 and additional payments, payable $30,000.00 down, $2,459.23 to be borrowed upon acceptance, and additional payments to be made in accordance with collateral agreement to be determined solely by the Audit Division and/or Appellate Division subsequent thereto. From the time of submission of the first offer, to submission of the fourth offer, the collection officers continually indicated that no offer would be recommended for approval until correct financial statements were submitted therewith. However, no advice as to what was claimed to be incorrect was ever given and claims by counsel for the Petitioner that summary dismissal of the offers without such specific advice or investigation by the Audit Division without an opportunity to answer or rebut the charges was irregular and inequitable were ignored. The collection agents continued on a course of stringent enforcement; they seized the Petitioner's bank accounts, seized personal property kept in a warehouse which was the property of his brother-in-law (141a), seized an automobile which was not registered in Petitioner's name (142a), filed liens on all life insurance properties, seized and sold his residence (143a) when his wife was ill and after they had been advised by attending physicians that such action would be detrimental to her health and, seized and sold contents of the residence. Before the seizure and sale of the residence, Petitioner's counsel, Nicholas Goschi, offered to conduct a private sale with guarantees of preservation of funds so that a greater

amount could be realized, and also to join in the sale adjacent lots owned by Petitioner's mother, which lots the collection agents later attempted to illegally seize and sell. This offer was also refused (287a). The collection officers filed levies and liens with all financial institutions with which the Petitioner did business; circulated freely around Petitioner's residential and business locality the fact that he was in serious trouble with the Bureau thereby causing extensive damage to his business, his standing in the community, and his chances to reconstruct a useful life that would benefit not only the Petitioner and his wife but also the community. Finally Petitioner's counsel, Nicholas Goschi, advised him that it was not possible to make any progress in handling the matter in the Rockford or Chicago, Illinois area and that inasmuch as his residence had been seized and sold, his personal property had been liquidated, his standing in the community was ruined, he no longer had ties in Rockford and he should consider establishing residence in a locality where his business could be rebuilt and where he would receive equitable treatment from the Internal Revenue Service (284a).

Pursuant to this advice Petitioner established domicile in New York and in August of 1963 engaged the law firm of Frederick and Goglio to represent him.

On September 11, 1963, Mr. Irving Raymar, an attorney associated with that firm, and former employee of the Internal Revenue Service where he specialized in offers in compromise, wrote to the District Director of Internal Revenue, Chicago, Illinois, to advise him of the change of domicile and to request transfer of the case to the New York area. On or about October 9, 1963 a revenue officer from the New York office investigated to see whether or not the New York office should accept the case. While it was obvious that the New York office was straining not

to accept the file it chose, on the flimsy ground that the Petitioner did not at the time have a permanent address in New York, not to accept it. It must be indicated here that during this period the New York office of the Internal Revenue Service was enmeshed in its own internal difficulties and more consideration was apparently given to possible increase of its own "work load" rather than to the rights of a citizen. On October 14, 1963, in order to transfer all assets of the Petitioner to his new domicile, Frederick and Goglio wrote to the Chicago office to request that in accordance with Section 7809 (b) of the Internal Revenue Code of 1954, the $30,000.00 deposited with the offer in compromise, and which had been in the possession of the Government since January 25, 1963, be returned to the Petitioner; the intent being to have it available for use with an offer to be filed in New York after the Petitioner had located a residence within his means. This was ignored and on December 13, 1963 another letter was forwarded to the Chicago office requesting that the money be returned to the Petitioner at his address at 904 Park Avenue, New York 21, New York. On January 22, 1964, the $30,000.00 deposit was received, not by the Petitioner at his address as requested in the letters forwarded, but by Mr. Irving Raymar at the office of Frederick and Goglio, 1440 Broadway, New York, New York, hand delivered by Revenue Officer Paul Tobias of the New York office, together with a levy attaching the funds dated January 10, 1964, signed by Earl M. Clark, the Rockford, Illinois revenue officer with whom it had not been possible to conduct prior negotiations. While the Internal Revenue Service had not considered the address of Frederick and Goglio adequate for transfer of the case, it did consider it adequate in order to place the deposit into the hands of a third party on whom a levy could be made. On

January 22, 1964 Frederick and Goglio wrote to the District Director of Internal Revenue, New York, New York to protest circumvention by the government of Section 7809 of the Internal Revenue Code which required return of any deposit made with a rejected offer in compromise and requested a meeting to discuss the matter. On January 31, 1964, after having the request for a meeting ignored, Frederick and Goglio returned to the New York Internal Revenue office the $30,000.00 check stating that they did not want to be a party to an improper act.

Subsequently on February 18, 1964 the Internal Revenue Service did comply with the law and returned the $30,000.00 deposit to Petitioner at his New York address. On advice of counsel, Petitioner used these funds to pay legal fees. overdue premiums on life insurance on which the Government had filed liens and which constituted the only asset left that would protect the Government's entire interest. repay loans, pay a nominal amount for personal necessities and retained the balance for submission with a new offer in compromise.

Meanwhile, the office of Frederick and Goglio was also engaged to handle a U. S. Tax Court petition in the matter of a jeopardy transferee assessment against Clara B. Vanderpool, the mother of the Petitioner, with Ward M. and Lee M. Vanderpool as transferors. This assessment was based on transfer of certain lots in Rockford, Illinois by the Petitioner to his mother. The case was docketed on September 18, 1963 and despite the provisions of Section 6863 of the Internal Revenue Code which prevent seizures and sale of property while a matter is pending in the U. S. Tax Court, attorneys Frederick and Goglio learned that the lots had been seized by Agents Clark and Meahan of the Rockford, Illinois office, and were being

offered for sale on October 9, 1963. It was only after telegrams protesting the illegal seizure and proposed sale were dispatched to the Chicago authorities that the sale was cancelled. These lots were subsequently found by the Tax Court to be the property of Clara Vanderpool.

Because of their own experience and the experiences of prior counsel with the case, the firm of Frederick and Goglio felt that the severe handling could not have been condoned by the authorities in charge and should be brought to their attention. Therefore, on May 25, 1964 they wrote to the District Director of Internal Revenue, Chicago, Illinois to explain the unusual elements of the case, the unusual charges made, and requested that the charges be investigated and that the case be transferred to New York where an equitable and proper hearing could be held. Included with that letter was a letter from former Counsel Nicholas Goschi (265a) outlining his difficulties with the Internal Revenue Service which led to his conclusion that nothing could be done in the Rockford or Chicago area. On June 11, 1964 a reply was received by Frederick and Goglio advising them that the Chicago office would again correspond with the New York office regarding their request to transfer the file. Subsequent to this Frederick and Goglio directed letters to the District Director of Internal Revenue, Chicago, Illinois dated July 15, 1964, August 26, 1964, October 1, 1964 and October 29, 1964, all requesting information as to the whereabouts of the file so that they would be able to resubmit offers and make payments thereon; continually advising that delay in processing was imperiling the Government's chance for collection inasmuch as the defendant's financial position was worsening. No replies were received and while it was obvious that the Internal Revenue Service

was not following the usual procedure to which any citizen is entitled, the reason did not become completely clear until sometime in November, 1964 when Frederick and Goglio learned that the Government had filed an order to show cause why the Petitioner should not be held to be guilty of violation of probation.

In short, because the Petitioner acted solely on advice of counsel, followed procedures which were in strict conformity with existing and applicable laws; while the Internal Revenue Service failed or refused to process his case in an unbiased manner obviously because of a predetermination of guilt, he was now facing imposition of a jail sentence with which he had been threatened by the collection officers of the Internal Revenue Service. Cooperation by the Petitioner, or attempts to cooperate obviously had not appeased the Service; the agents apparently because of personal antagonism (277a) wanted a complete and total surrender of all of his constitutional rights and dignity which the Petitioner felt was contrary to the rights of any citizen, even one guilty of a one time lapse.

At the revocation of probation proceedings in the District Court, the Government's chief witness was Frank W. Rosborough, a special agent of the Internal Revenue Service. He testified that he had been assigned to the case in 1959 or maybe early in 1960 (26a), which was after the indictment of the Petitioner, and that after conviction it was his duty to determine whether the Petitioner complied with the terms of probation and write probation reports, and that he continued the investigation for those purposes thereafter (27a). He further testified that he was familiar with the offers in compromise or financial reports submitted by the Petitioner to the collection division (27a). The assignment of Agent Rosborough to the case was unknown to and undisclosed to the Petitioner or

his representatives, and his testimony at the hearing disclosed to them for the first time the facts upon which the Internal Revenue Service had concluded that statements submitted to it by the Petitioner were false. At the hearing these allegations were either easily rebutted or disproved and despite the apparent inaccuracies of Mr. Rosborough's testimony, which included the most irrelevant, immaterial and incorrect matters, with conclusions drawn from hearsay or completely unproven or irrelevant evidence, to which no objection was taken by the defense because of the informality of the proceedings, the testimony was freely admitted into evidence by the trial judge. The judge on the other hand continually interfered with cross examination of the prosecution witness, direct examination of defense witnesses, and directed strictly the scope of inquiry by defense counsel. Agent Rosborough stated on cross examination that he had spent 17½ years in the Internal Revenue Service, 11 years 4 months as a special agent and the balance as a revenue officer (26a) and while he was the expert to whom the Government had assigned the task of determining if the Petitioner was trying to make payment of his civil liability to the best of his ability, he did not know what a collateral agreement, which is an integral part of an offer in compromise, was (106a). The prosecuting attorney and the trial judge also did not apparently understand what an offer in compromise was. They were convinced that it was merely a bargaining procedure to be employed by a debtor taxpayer and that any payments made with an offer constituted payments with strings attached (259a, 264a, 282a). Explanation by defense counsel and defense witnesses who are tax attorneys that the Government had no power to bargain and that any offer in compromise for a tax legally imposed was based only on ability to pay to the best of a debtor's

ability were unavailing. The trial judge adamantly clung to his misconceptions and refused even to listen to defense efforts to clarify the law or explain efforts by Petitioner to make payment to the best of his ability.

From the outset, the trial judge conducted the hearing on the basis that after having divined that payment of civil liability to the best of the Petitioner's ability meant payment of a sum certain of $35,000.00 by the Petitioner (319a), that negotiations with the Internal Revenue Service, attempts to make payments, improper actions by the Internal Revenue Service, or any other mitigating factor affecting decisions made by either Petitioner or his counsel were not to be considered.

It is this arbitrary and erroneous position taken by the trial judge that has prevented required use of sound judicial discretion in this case and which, together with harsh and unjust acts of the Internal Revenue Service, have deprived the Petitioner of rights guaranteed him by the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

1. The Condition of Probation is Unconstitutional and Void for Vagueness and Uncertainty.

The minute order dated November 17, 1961 issuing from the Court of Judge Miner indicates the withdrawal of the plea of not guilty, the imposition of sentence suspended, the placing of the defendant on probation for a period of three years " . . . upon the special condition that he make payment of the civil liability to the best of his ability . . . " In addition a fine of $10,000.00 was imposed on each of Counts I and II for a total sum of $20,000.00 plus costs (7a). His colloquy in full (10-12a) makes it clear that Judge Miner took no cognizance of any determined amount when imposing the condition of probation. Judge Decker on the other hand, because of a misconception of or arbitrary determination of the condition of probation interpreted the special condition as requiring an outright payment of $35,000.00. This is indicated in his statement to Mr. Vanderpool at sentencing as reflected in the record (319a):

> " . . . The difficulty that your case presents me is that after you were placed on probation and Judge Miner was good enough to grant probation to you, to give you an opportunity to pay your civil tax liability, but although without any question, as the record clearly shows in this case, you had sufficient assets to pay that $35,000.00, the $35,000.00 in this case, you not only failed to pay it, but in addition to that, from the outset in this case, after you were placed on probation you made what were very plainly false statements to the government. First of all you said that you had to borrow the money to pay your fine. That was false. Then you filed a financial statement in which

> you failed to list among your assets certain stocks, and that stock had considerable value . . . You paid your fine and I can give you credit perhaps for as much as $20,000.00, or a little over $20,000.00, as to what you spent. Then there is $121,000.00 unaccounted for . . . "

The above statement enounces the two bases upon which Judge Decker revoked the Petitioner's probation —

1. Failure of Petitioner to pay $35,000.00 outright to the Government

and

2. Submission by Petitioner of allegedly false statements to the Government.

Both of the above bases rest on conclusions of the Court which involve serious constitutional questions. The first basis is discussed here and the other is discussed elsewhere in this petition.

1. Failure of Petitioner to Pay $35,000.00 Outright to the Government.

What did the condition that Petitioner make payment of his civil liability to the best of his ability mean? Did it mean —

a. Payment of $135,000.00; the total asserted civil tax liability plus penalties and interest for three years, including the one covered by the indictment and the two years not referred to therein? or

b. Did it mean, as Judge Miner seems to say in the colloquy accompanying sentence, that the Petitioner work out a good faith settlement of the assessed liability asserted by the Internal Revenue Service for the single year specified in the indictment, which assessment was ultimately determined to be $111,000.00 including interest or penalties? or

c. Did it mean, as the trial judge contended on hearing for revocation of probation, that Petitioner would have fully satisfied the condition of probation had he paid the Internal Revenue Service the $35,000.00 figure mentioned in the indictment, to apply unconditionally to his tax liability? or

d. Did it mean, as Petitioner's counsel interpreted, that since the Petitioner could not pay in full, he should attempt to compromise or settle his entire tax liability by pursuing the recognized, legal and authorized procedure of making an offer in compromise which the trial judge failed to understand requires payment to the best of an offerer's ability to pay plus additional payments from future earnings and receipts, including non-taxable receipts of all kinds? or

e. Did it mean that some other unknown factor or combination of the factors would satisfy the condition?

The Petitioner, a businessman unskilled in tax matters, employed counsel he believed to be competent, who were previously employed by the Internal Revenue Service or the Department of Justice and who advised Petitioner that in their opinions submission of offers in compromise was the proper procedure to follow to satisfy the terms of probation.

The respondent, in its brief filed in the U. S. Court of Appeals for the Seventh Circuit in this case argued that the very condition of probation here imposed was upheld by the Seventh Circuit Court of Appeals quoted from *United States* v. *Steiner* (7th Cir. 1957) 239 F. 2d 660, cert. denied 353 U.S. 936. The brief stated in part as follows (Page 32):

> "The Court went on to point out that payment was not required, only *effort* to pay, and upheld the District Court's decision that the effort had not been made by Steiner."

Respondent admitted in the above brief that petitioner made at least five efforts to pay. The final offer, while rejected by the Audit Division, is still pending in the Appellate Division of the Internal Revenue Service.

In the case under review the trial judge has arbitrarily construed the provision of probation as requiring actual outright payment of an amount of $35,000.00 that he alone divined would satisfy the requirement, rejecting or overlooking completely the holding of the higher court in his circuit that only effort to pay was required.

In *Wright* v. *Georgia,* 373 U.S. 284, 293 (1963) the court said (per Warren, Ch. J):

> "It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. *Lanzetta* v. *New Jersey,* 306 U.S. 451; *Connally* v. *General Construction Co.,* 269 U.S. 385; *United States* v. *Cohen Grocery Co.,* 255 U.S. 81; see also *United States* v. *National Dairy Products Corp.,* 372 U.S. 29. See also *Bouie* v. *City of Columbia,* 378 U.S. 347, 350 (1964)."

In the instant case neither the Internal Revenue Service, nor the Probation Department, nor the Court gave any notice that submission of offers in compromise violated the probation.

In *Winters* v. *New York,* 333 U.S. 507, 515 (1948) the Court said:

> "There must be ascertainable standards of guilt."

It quoted with approval the following statement of law (p. 516):

> "Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." (*State* v. *Diamond*, 27 N. Mex. 477, 485, 202 Pac. 988)

The Court concluded (333 U. S. at p. 520):

> "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon* v. *Lowry*, 301 U.S. 242, 259."

Freund, The Supreme Court and Civil Liberties, 4 Vand L. Rev. 533, 541 (1951) quoted with approval in *Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964):

> "The objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact."

This Court concisely summarized the applicable rule in *Graccio* v. *Pennsylvania*, 34 U.S. Law Week 4099, 4100 (January 19, 1966):

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. See e.g. *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Baggett* v. *Bullitt*, 377 U.S. 360."

The sentencing of Petitioner to prison for violation of a standard of conduct too vague to be a true guide, even with constant guidance of counsel, is so basically repugnant to our traditional concepts of due process that no

sentence based on such a situation should be allowed to stand and reversal without remand is indicated as the only appropriate relief.

> "no person shall be . . . deprived of life, liberty or property without due process of law; . . . " Constitution of the United States, Amendment V.

The most appropriate summary for this case was expressed in Justice Black's dissenting opinion in *Ralph Ginzburg, et al.* v. *United States,* 34 Law Week 4255 at page 4259:

> " . . . Criminal punishment by government, although universally recognized as a necessity in limited areas of conduct, is an exercise of one of government's most awesome and dangerous powers. Consequently, wise and good governments make all possible efforts to hedge this dangerous power by restricting it within easily identifiable boundaries. Experience, and wisdom flowing out of that experience, long ago led to the belief that agents of government should not be vested with power and discretion to define and punish as criminal past conduct which had not been clearly defined as criminal in advance."

The trial judge's ruling based on his interpretation of a vague provision of probation that the Petitioner should have paid in at least $35,000.00 is repugnant to the due process clause of the Constitution and particularly to the decision of this Court in *Graccio* v. *Pennsylvania, Supra,* which established that due process is thwarted when a law is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without any legally fixed standards, what is prohibited and what is not in each particular case.

The argument of the Respondent made in the Lower Court that the issue of lack of clarity had no merit because

of failure of Petitioner to file an appeal is spurious. The issue here is not the right of a trial court to impose probation, but rather the right of a court, other than the one that imposed the original sentence, to impose a criminal penalty because of failure of prudent and experienced counsel to correctly, in its opinion, interpret a very vague condition of probation, the fulfillment of which passed from judicial to administrative control as evidenced by the fact that the charge of violation of probation was made not by the Probation Department as a result of its own independent findings but by the Internal Revenue Service, the very agency which refused or failed to grant to the Petitioner or his counsel the rights to which any citizen is entitled. It is the generally prevailing view today among probation authorities that probation is, and to be effective must be, casework which requires that the correctional officer deal with his client as an individual and that he consciously controls what he does so that his activity contributes within reality limits to the welfare of his client. Mr. Ben Meeker, chief probation officer in the Chicago Federal District Court has maintained that probation is casework, pointing out that they have in common; emphasis upon working with the individual in a relationship; the releasing of tensions, frustrations and aggressions; providing opportunities for the person to gain satisfactions; use of such techniques as the interview, the casework conference, and referral. ("Probation is Casework", Fed. Prob. vol. 12, no. 2, pp. 51-54, June 1948) The Petitioner to his knowledge satisfied the Probation Office that he was attempting to comply with the condition of probation and neither he nor his counsel were ever notified by that Probation Department that action other than he was taking was necessary. In fact there has been no showing that the Internal Revenue Service, prior to its

move at the very end of the probation period to seek revocation of probation bothered to even advise the Probation Department that in its opinion the condition of probation was not being adhered to. Despite the trial judge's interpretation there has been no showing that the Internal Revenue Service would have accepted payment of $35,000.00 as fulfillment of condition of probation.

The embracement of the trial judge's interpretation by the U. S. Attorney was based on convenience for prosecution, rather than on equitable and just standards necessary for exercise of sound judicial discretion and was contrary to his duty not only to prosecute but to help the accused bring the truth before the Court so that justice could be achieved.

2. Revocation of Probation Based on Alleged Submission of False Statements Constitutes Imprisonment of Petitioner Without Due Process, Surrenders to the Executive Branch the Power of the Judiciary, and Prevents Exercise of Sound Judicial Discretion by the Judiciary.

While the trial judge has concluded that the Petitioner could have satisfied the conditions of probation by paying $35,000.00 to the Government, the Internal Revenue Service has never conceded that this was or would be the basis for satisfaction of such condition. In fact, while the Internal Revenue Service had in its possession the $30,000.00 deposited with the first offer in compromise plus $15,726.06 which the Government realized from sale of assets seized (31a), for a total of $45,726.06, they never gave any indication that the provision of probation would be satisfied even by that amount. Instead the representatives of the Service properly embarked upon collection of the full amount of approximately $135,000.00. Despite their combined efforts the record clearly shows that the evidence

of alleged acts of wrongdoing by Petitioner in this case does not meet the standard of proof that would be required if the Government attempted to proceed under other statutes which specifically cover the alleged acts of wrongdoing by Petitioner such as:

Title 26, §7201 which makes it a crime to attempt in any manner to evade or defeat any tax imposed or the payment thereof.

Title 26, §7203 which makes it a crime for a person required to pay any tax to wilfully fail to pay such tax or any person required to supply information concerning a tax to wilfully fail to supply such information.

Title 26, §7206, Paragraph 5, provides with regard to compromises and closing agreements, that the concealment from any officer or employee of the United States of property belonging to a taxpayer or the making of any false statement relating to the financial condition of the taxpayer with respect to his tax liability a crime.

It is obvious that if the Government, which allegedly had a Special Agent assigned to this case from late 1959 or early 1960, had been able to sustain the burden of proof necessary to convict the Petitioner of acts with which it now charges him, that it would be under the duty to do so and unquestionably would have done so. However, failing in its burden of proof the Government chose instead to use the judiciary as an adjunct of an administrative agency and requested that the Court conduct a hearing for revocation of probation.

The trial judge, despite the insufficiency of the evidence and rebuttal of that offered, chose to conclude that false statements had been filed. By charging at sentencing (319a) that only $20,000.00 of $160,000.00 available was

accounted for, he merely repeated the erroneous testimony of the Special Agent (92a) and failed to allow credit for such definitely ascertained or ascertainable items such as the $30,000.00 deposited with the Internal Revenue Service, repayment of loans on securities, payment of insurance premiums, mortgage installments, real estate taxes, legal fees, advances made to keep Petitioner's business alive and medical bills. The mere acceptance by the trial court of the charges made by the Administrative Agency violated the constitutional rights of the Petitioner that it was the duty of the Court to protect; and its failure to do so must place its decision outside the realm of sound judicial discretion.

The respondent, in brief, on appeal filed in the lower court argued that burden of proof required under due process where the crimes listed above are charged was not applicable in this procedure and relied heavily on *Yates* v. *United States,* 308 F. 2d 737, 739 (10 Cir. 1962):

> "Probation, once granted, may of course be revoked by the Court upon a summary hearing without notice to the probationer of specific charges of violation of the conditions thereof. *Burns* v. *United States,* 287 U.S. 216, 53 S. Ct. 154, 77 L. Ed. 266. Whether it should be revoked in a particular case is within the sound judicial discretion of the Court granting it. *Nelson* v. *United States,* 10 Cir. 225 F. 2d 902; *Hamilton* v. *United States,* 10 Cir., 219 F. 2d 634; *Gillespie* v. *Hunter,* 10 Cir., 159 F. 2d 412. In an appeal from an order revoking probation the only question presented is whether the trial court exercised sound judicial discretion. *Burns* v. *United States, supra; Hensley* v. *United States,* 5 Cir. 257 F. 2d 681; *Pritchett* v. *United States,* 4 Cir. 67 F. 2d 244."

It is conceded that the trial court had great latitude in conducting the hearing and making a decision to revoke probation but with this great latitude rested the responsi-

bility of exercise of sound judicial discretion. It cannot possibly be advanced that this great latitude should be so loosely and arbitrarily exercised as to constitute unquestioned and indiscriminate use of criminal punishment which was aptly described by Justice Black, *supra,* as "one of Government's most awesome and dangerous powers".

It is true that Judge Decker took evidence for over two days, and heard argument on a third day. Judge Decker ruled at the outset of the hearing that the hearings were informal but while procedure to present testimony and documents may not have complied with formal rules of evidence, there was still a requirement to conduct the hearings in a manner that would insure that the accused receive the benefits of due process, without which it was not possible for the trial court to exercise *sound judicial discretion.*

From the outset of the hearings Judge Decker conducted the proceedings in accordance with his own particular interpretation that unconditional payment of $35,000.00 was the special condition of probation. This appears clearly in the record. An interrogation by the court of the Petitioner and his counsel early in petitioner's testimony (60a) on what he knew about his tax liability at the time he was liquidating his assets, elicited the answer that there had been no final assessment of the tax liability at that time. The court said, however, that Petitioner at least knew of a $35,000.00 tax liability because he had pleaded guilty to an indictment charging that amount (60a).

In the conduct of the hearing the trial judge exercised the greatest leniency toward the respondent in the admission of irrelevant, uncorroborated and inconclusive testimony and evidence, much of which proved under further

investigation or cross examination to be erroneous or easily rebuttable (29a, 36-40a, 47-48a, 51-52a, 67-69a, 72a, 80a, 83a, 86-90a, 94-95a, 101a, 151a, 155a, 163a, 167a, 168a, 171-173a, 174a, 183-185a, 192-193a, 194-237a, 247a, 269a). On the other hand the trial judge from the inception of the hearing continually objected to introduction of testimony by Petitioner or his witnesses or cross examination of respondent's witnesses (102-103a, 110-111a, 143a, 145-146a, 157a, 169-170a, 174a, 186a, 201a, 239a, 251-255a, 258a, 259-262a, 263-266a, 280a, 282a, 283a).

The trial judge conducted the hearings under the misconception that an offer in compromise is a bargaining procedure and that payments made with such offer were payments made with strings attached (109-110a, 295a, 264a, 282a). While dealings and negotiations with the Internal Revenue Service go to the crux of the matter to determine if Petitioner attempted in good faith to make payments to the best of his ability, the trial judge stated that he was not interested in, nor would he listen to what difficulties were had with that Service by Petitioner or his counsel (263a, 264a, 265a).

There is no question that the trial court was unduly influenced by its own misconceptions of the laws and facts applicable to this case. Thus its findings reflected not the weight of evidence sufficient to justify a decision within the court's sound judicial discretion, but the sinister connotation improperly attributed to certain acts of the Petitioner, as presented and capitalized upon by the Assistant United States Attorney.

The exercise of sound judicial discretion in this case required attention to the following factors:

a. That revocation of probation of petitioner is tantamount to conviction of misconduct for his proper exercise of his statutory right to make offers in compromise and of the applicable laws pertaining thereto.

No court has jurisdiction to abrogate or suspend such statutory rights.

b. That revocation of probation of the petitioner is tantamount to conviction for failure of a debtor to prefer the government over other creditors.

31 U. S. C. §191, provides as follows:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall first be satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

There is no priority to the United States unless and until one of the three stated situations occurs: assignment, attachment or act of bankruptcy. In the instant case there is no evidence to show that any of the three conditions mentioned above exists. Hence, there is no basis, even in a civil action, for the claim that respondent's failure voluntarily and informally to prefer the government was improper. Much less can it be claimed that there is a criminal sanction upon his failure to do so. *U. S.* v. *Goodman,* 190 F. Supp. 847, 856 (N.D. Ill. 1961).

c. That petitioner acted only upon the advice of competent counsel.

Faced with a command that he pay his civil liability to the best of his ability or be imprisoned without trial the Petitioner acted from date of sentencing to the present only on advice of competent counsel, all of whom had served in the Internal Revenue Service or the Department of Justice. There is no question that he acted in good faith upon the advice of his attorneys and in this case there is no evidence that Petitioner failed to make full disclosure to his attorneys. In fact they were given all the records and they prepared the financial statements. Five recognized and competent tax attorneys all advised the Petitioner that he was following the correct procedure by filing offers in compromise. Unless the decision of the lower court is reversed the legal profession will be left without discretion in matters involving interpretation and will have to conform to the demands of any agency.

d. That the record affirmatively shows that petitioner negotiated in good faith for settlement of his tax liability.

While the Government attempted at the hearing to cast doubt as to the motives behind Petitioner's liquidation of his assets it was not able to establish that all receipts and all expenditures had not been shown in statements or tax returns filed with the Internal Revenue Service by the Petitioner. Alleged omissions of assets from statements proved to be erroneous and the trial judge's conclusions that Petitioner made a false statement that money had to be borrowed to pay a fine of $20,000.00 (319a), that false financial statements were filed (319a) were erroneous. The trial judge apparently was unable to comprehend that while the Petitioner was liquidating his assets prior to

determination of the assessment the proceeds were kept *in solido* and that it was not possible for Petitioner at the time of the hearing to trace the particular proceeds into specific payments. At the hearing the trial judge questioned the Petitioner regarding the source of $30,000.00 paid by Petitioner to Internal Revenue Service with his first offer in compromise, $20,000.00 of which was in cash (54a). The Petitioner tried to explain that all of the cash used came from one fund he had accumulated from liquidation of assets and borrowings, some of which was needed to pay his $20,000.00 fine (54-56a). The court persisted in following this line of questioning and in response to a question by the Court whether the $20,000.00 in cash included in the payment of the $30,000.00 with the offer in compromise was borrowed from anyone the Petitioner answered, "I don't know. Some of the funds that I had at that particular time were borrowed, because I had to pay a $20,000.00 fine." The Court then asked, "Well, did you borrow any of that $20,000.00?" (55a) The Petitioner then replied, "I don't know, sir. I cannot recall specifically whether it was any of that specific $20,000.00 or not, because all of the funds were being accumulated for the same purpose; and I cannot say that those particular sums, that particular $20,000.00 worth of $100.00 bills were any specific part of the entire amount." (55-56a)

By the end of this exchange it could not possibly be clear to the Petitioner which $20,000.00 was being referred to but the record is clear that Petitioner stated specifically that he could not identify the specific source of the specific amount. The trial judge concluded, and obviously erroneously so, that Petitioner falsely stated that he had to borrow the $20,000.00 with which to pay his fine and so stated at time of sentencing. This erroneous conclusion certainly is not within the realm of the exercise of sound judicial discretion.

Conclusion

There appears to be no doubt that exercise of sound judicial discretion in this case demanded something more than a formation of a mere opinion by the trial judge based on misconceptions, misunderstanding of law and the facts, and disinclination to listen to testimony by Petitioner and his counsel of difficulties encountered with the Internal Revenue Service in attempting to make offers of payment. A mere summary acceptance of facts presented by an adverse, uncooperative and inflexible executive agency, in this case, the Internal Revenue Service, cannot possibly constitute exercise of sound judicial discretion. There should have been eliminated from consideration all unproven facts or those based on mere assumption such as inference of a Swiss bank account merely because the Petitioner went on a European business trip. To do anything less was to surrender the judicial power of the Court to an administrative agency which handled the matter under an erroneous predetermination of guilt. Such surrender of power is repugnant to our basic constitutional concepts such as due process, equal protection of the laws and separation of powers.

Now, if ever, is the time when actions and charges by the Internal Revenue Service should be subjected to thorough judicial review. With revelations as to its own improprieties appearing almost daily, the taxpaying public should be reassured that administrative power of so far reaching an agency will not go unchecked when improperly or questionably used.

DUE PROCESS has been flaunted by failure of the Government to properly support its charges of wrongdoing by the Petitioner.

EQUAL PROTECTION OF THE LAWS has been denied by denying to the Petitioner the right to utilize the provisions of 26 USCA 7122, the Section of the Code authorizing compromise of tax liability, and the implementing regulation, Federal Tax Regulations, Sec. 301.7122-2.

THE SEPARATION OF POWERS DOCTRINE has been breached by allowing an administrative agency to resist bona fide and good faith efforts to dispose of Petitioner's tax liability, using as a threat for collection, imprisonment of the Petitioner by the Judiciary. The probation order surrendered to the executive branch the judicial power to put the Petitioner in jail unless he paid his tax liability to the best of his ability as decided by the executive agency. It was the Internal Revenue Service that fixed the liability, it was the Internal Revenue Service that decided whether or not the offers in compromise submitted were satisfactory without proper and usual investigation, and it was the Internal Revenue Service and not the Probation Office which moved to seek revocation of probation. The Internal Revenue Service set the standards of good faith that Petitioner had to meet while at the same time it showed little or no good faith in its dealings with the Petitioner or its counsel. In fact the failure of the Internal Revenue Service to conduct bona fide conferences with the Petitioner's counsel during the last year of probation even when continually asked to do so and after being advised by counsel for Petitioner that failure to do so was adverse to the best interests of the Government, following which it took steps for revocation of probation is tantamount to ENTRAPMENT which is repugnant to and contrary to established standards of fairness.

It is further stated that the revocation of Petitioner's probation constitutes IMPRISONMENT FOR DEBT to which there is a traditional revulsion in our judicial system. Even a man imprisoned and in addition subject to fine, is given the opportunity at the end of his sentence to obtain his release by proof of his inability to pay the fine. This satisfies our deeply rooted belief that no man be imprisoned because of financial inability. Why then should an administrative agency be delegated the judicial power to imprison a man who was spared prison because of the merits of his situation at the time of the imposition of sentence because in the opinion of that agency he failed to make payment of an amount undefined at time of sentence? Does this not hand the weapon of the threat of imprisonment to such agency which in this case chose to use it rather than to negotiate in good faith with Petitioner's counsel. That the Internal Revenue Service, whose activities enter into the lives of such a large percentage of our citizens can abuse this potent force is an overwhelming reason why the continuation of this situation should not be tolerated. The trial court, in the exercise of its judicial powers should have zealously guarded the separation of powers doctrine and should have allowed and considered all evidence relating to negotiations by counsel of Petitioner with the Internal Revenue Service and thorough cross examination of respondent's witnesses. Failure to do so constituted not only the improper exercise of judicial discretion but a denial of inalienable constitutional rights. In his book "The Right of the People", Justice Douglas wrote "the individual needs protection from government itself—from the executive branch, from the legislative branch, and even from the tyranny of judges."

Imprisonment of a man who, while guilty of a serious but not heinous crime, has lost his home, his personal property, has seen his business ruined, has had his standing in the community damaged beyond repair, has been involved in investigations and litigation since 1955 and has lived in a state of purgatory during the past four years and has seen both his health and the physical and mental health of his wife deteriorate to the point where full utilization of their time remaining may no longer be possible, merely because he, his counsel and the Probation Department failed to interpret the facts, conditions and circumstances pertaining to his probation to the satisfaction of a judge other than the one who chose not to impose imprisonment on original sentencing, would indeed constitute a harsh and inhuman punishment that would not be in accord with our established principles of constructive and remedial rather than punitive system of justice.

The relationship between public officials and those who deal with them and preservation of civil and constitutional rights of individuals are of nation-wide significance. These important federal questions should be settled by this Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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